Supreme Court, U.S.
FILED

No. 03-997

OCT 24 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

FREDERICK GORDON,

Petitioner,

v.

ROBERT T. MEANS and LINNEA M. MEANS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. SHOULD THE FUNDAMENTAL, CONSTITUTIONALLY PROTECTEDRIGHTS OF FREDERICK GORDON TO PARENT HIS ONLY SON, IN A MATTER WHERE NEITHER ALLEGATIONS NOR EVIDENCE OF PARENTAL UNFITNESS WAS OFFERED, BE DENIED CONSIDERATION ON APPEAL DUE TO THE SOLE FACT THAT THE NAME OF A GUARDIAN AD LITEM, WHO WAS NEITHER A PARTY NOR AN APPELLEE AS DEFINED BY THE VIRGINIA SUPREME COURT RULES, WAS NOT INCLUDED IN AN INITIAL NOTICE OF APPEAL?

STATEMENT OF PARTIES TO PROCEEDING

1. The names of the parties requesting the adoption of the minor child at issue in this cause are provided in the caption of the case. The names are as follows:

ROBERT T. MEANS

LINNEA M. MEANS

(last known counsel: SHOUN & BACH, 12700 Fair Lakes Circle, #300, Fairfax, Virginia, 22033-4905)

A pro bono guardian ad litem was appointed in this cause at the request of Frederick Gordon. The guardian ad litem did not join in the petition for adoption. The guardian ad litem was not a party to the case pursuant to the Rules of the Virginia Supreme Court. The guardian ad litem's name is as follows:

JEFFREY N. SILVERSTEIN

5641 Burke Center Parkway, Suite 200
Burke, Virginia 22015
(703)239-0855
(703)978-3947 facsimile

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COMES NOW FREDERICK GORDON, by his counsel, and hereby respectfully petitions this Honorable Court for Writ of Certiorari with regard to the decision made by the Supreme Court of the Commonwealth of Virginia wherein his appeal of the granting of an adoption with neither allegations nor evidence of parental unfitness having been made was dismissed due to the fact that the initial notice of appeal filed in said matter did not name a pro bono guardian ad litem, not a petitioner, not a party, as an appellee.

CASE CITATIONS IN PRIOR COURT

1. The Fairfax County Circuit Court: In Re: The Adoption of Nash Means Gordon In Chancery No. 4948

2. In the Court of Appeals of Virginia: Frederick Gordon v. Robert Means & Linnea Means; Record No. 2877-02-4

3. In the Supreme Court of Virginia: Frederick Gordon v. Robert Means & Linnea Means; Record No. 031445

STATEMENT OF BASIS FOR JURISDICTION

1. An order was entered by the Supreme Court of the Commonwealth of Virginia on July 28, 2003, dismissing the appeal filed by Frederick Gordon with regard to the dismissal of the matter by the Court of Appeals of Virginia.

2. This Honorable Court is conferred jurisdiction to review this matter on a writ of certiorari pursuant to Rule 10 and/or Rule 20 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution.

2. *May v. Anderson,* 345 U.S. 528 (1953).

3. *M.L.B. v. S.L.J.,* 519 U.S. 102 (1996).

4. *Troxel v. Granville,* 530 U.S. 57 (2000).

5. *Stanley v. Illinois,* 405 U.S. 645 (1972).

6. *Meyer v. Nebraska,* 262 U.S. 390 (1923).

7. *Skinner v. Oklahoma,* 316 U.S. 535 (1953).

8. *Santosky v. Kramer,* 455 U.S. 745 (1982).

9. *Mayer v. Chicago,* 404 U.S. 189 (1971).

10. *Griffin v. Illinois,* 351 U.S. 12 (1956).

11. *United States v. Kras,* 409 U.S. 434 (1973).

12. *Zabloski v. Redhail,* 434 U.S. 374 (1978).

(Specific provisions set forth in appendix attached hereto)

STATEMENT OF THE CASE

1. The Supreme Court of the Commonwealth of Virginia dismissed the appeal of Frederick Gordon with regard to the granting of an adoption of his minor son with neither allegations nor evidence of parental unfitness having been made due to the fact that the initial notice of appeal filed in said matter did not name a pro bono guardian ad litem, not a petitioner, not a party, as an appellee. Thus, Frederick Gordon's Fourteenth Amendment rights were completely overlooked due to an indefinite, undefined notice provision asserted by the Court of Appeals of Virginia in Its dismissal of the same.

REASONS FOR ALLOWANCE OF WRIT

A writ for certiorari should be issued in this case due to the fact that the fundamental, constitutionally protected, parental rights of Frederick Gordon were terminated by the Circuit Court of Fairfax County, Virginia, following a proceeding where not one scintilla of evidence was offered regarding allegations or assertions of parental unfitness on the part of Frederick Gordon. Mr.Gordon's inability to aggressively retrieve his son from the petitioners was due to his poverty, not due to parental unfitness. His rights to parent his young son are constitutionally protected and must not be casually tossed aside due to the fact that a guardian ad litem, not a party, not a petitioner, to the cause was not included as an appellee

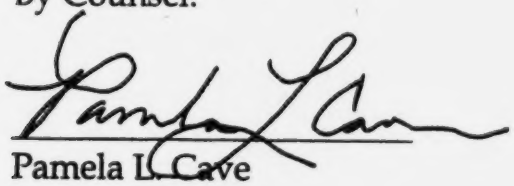
in the initial notice of appeal filed with regard to the circuit court matter.

To allow Frederick Gordon's parental rights to be terminated without a full and proper consideration of Mr. Gordon's constitutionally protected rights would be a manifest injustice. Such a termination is contrary to the values and traditions long protected and preserved by this Court and by the Constitution of the United States.

Respectfully Submitted,

FREDERICK GORDON

By Counsel:



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VIRGINIA :

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 28th day of July, 2003.

Frederick Gordon, Appellant,

against Record No. 031445
Court of Appeals No. 2877-02-4

Robert Means, et al., Appellees.

ENTERED: July 28, 2003

From the Court of Appeals of Virginia

Finding that the decision of the Court of Appeals does not involve (1) a substantial constitutional questions as a determinative issue, or (2) matters of significant precedential value, the Court dismisses the petition for appeal filed in the above-styled case. Code § 17.1-410 (A)(3) and (B).

A Copy,

Teste:

Patricia H. Krueger, Clerk

By:

Deputy Clerk

VIRGINIA :

In the Court of Appeals of Virginia on Wednesday the 16th day of April, 2003.

Frederick Gordon, Appellant,

against Record No. 2877-02-4
Circuit Court No. A04948

Robert Means and
Linnea Means, Appellees.

ENTERED: April 16, 2003

From the Circuit Court of Fairfax County

Frederick Gordon (appellant) appeals from the circuit court order granting the adoption of his minor child over appellant's objection. The court previously appointed a guardian ad litem to represent the interests of the child. The guardian ad litem endorsed the order of the adoption "Seen and agreed."

Appellees have filed a motion to dismiss the appeal, arguing that appellant did not timely file and properly notify the guardian ad litem of the appeal. Appellant has filed a response to the motion, arguing that his failure to notify the guardian ad litem is not a jurisdictional defect.

"No appeal shall be allowed unless, within 30 days after entry of final judgment or other appealable order or decree, counsel [for appellant] files with the

clerk of the trial court a notice of appeal, and at the same time mails or delivers a copy of such notice to all opposing counsel..." Rule 5A:6(a). The notice of appeal must contain a certificate listing all appellees and stating that the notice has been mailed or delivered to all opposing counsel. Rule 5A:6(d).

An appellate court cannot adjudicate an appeal unless all necessary parties are properly before the court. Asch v. Friends of the Community of the Mount Vernon Yacht Club, 251 Va. 89, 91, 465 S.E.2d 817, 818 (1996). "A necessary party is one whose interests are likely to be defeated or diminished by a successful appeal." Hughes v. York County Department of Soc. Serv., 36 Va. App. 22, 25, 548 S.E.2d 237, 238 (2001). "Where the guardian ad litem has taken a position on behalf of the children in opposition to the appealing party, then the interests of the children are subject to being '"defeated or diminished"' by the appellant's claim." Id. at 26, 548 S.E.2d at 239.

Appellant failed to provide the guardian ad litem with a copy of the notice of appeal within the jurisdictional time frame. The guardian ad litem was not, therefore, made a party to the appeal. Because the guardian ad litem was an indispensable party, we cannot entertain this appeal. Accordingly, this appeal is dismissed.

This order shall be certified to the trial court.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By:

Deputy Clerk

U.S. Const. amend. XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

II. THE ADOPTION OF NASH VIOLATES MR. GORDON'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO THE CARE AND CUSTODY OF HIS CHILD.

Besides being directly contrary to the governing statutes, the adoption decree violated Mr. Gordon's constitutional rights. Both this Court and the United States Supreme Court have recognized that parents have a fundamental right to the care and custody of their children protected by the due process clauses of the Virginia and United States Constitutions. The state may not sever this fundamental right unless the termination is narrowly tailored to serve a compelling government interest. This case does not even come close to meeting that standard.

A. The Relationship Between Mr. Gordon and Nash is a Fundamental Right Protected by the United States and Virginia Constitutions.

In *F.E. v. G.F.M.*, 35 Va.App. 648, 547 S.E.2d 531 (2001) (*en banc*), this Court recognized that the right of a parent to maintain his relationship with his child is a fundamental right, protected by the due process clauses of the United States Constitution and the Virginia

Constitution.[1] This decision was consistent with a long line of United States Supreme Court cases holding that such a relationship is "far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953), and deserving of special protection under the Constitution.

The United States Supreme Court has long recognized that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citation omitted). *See also Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case – the interest of parents in the care, custody and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court"). The Court has been particularly adamant that parental rights may not be terminated without strong safeguards to ensure that fit and capable parents do not lose their children – and that children do not unnecessarily

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[1] The Fourteenth Amendment to the United States Constitution provides, in part, "No State shall . . . deprive any person of life, liberty, or property without due process of law . . ." Article I, § 11 of the Virginia Constitution provides that "no person shall be deprived of his life, liberty, or property without due process of law."

lose the opportunity to know and love their parents.

In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court considered the case of an unwed father of three who had participated in raising his children for eighteen years. After the mother died, the State removed the children from his custody and terminated his parental rights, pursuant to a statute which held that unwed fathers are unfit parents as a matter of law.

The Court first observed that "[t]he rights to conceive and to raise one's children have been deemed 'essential,' basic civil rights of man,' and 'rights far more precious . . . than property rights'" 405 U.S. at 651 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541; *May v. Anderson*, 345 U.S. 528, 533, (1953)). Moreover, "the law [has not] refused to recognize those family relationships unlegitimized by a marriage ceremony," *id.*, and "familial bonds in such cases [are] often as warm, enduring, and important as those arising within a more formally organized family unit." *Id.* at 652.

The Court determined that the fundamental right to have a relationship with one's child is protected both by the due process clause and the equal protection clause of the Fourteenth Amendment. "[A]s a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children

were taken from him and . . ., by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth amendment." *Stanley*, 406 U.S. at 649.

In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Court determined that the importance of familial rights was so great that the state could not terminate those rights based on the usual "preponderance of the evidence" standard for civil cases. Instead, "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." 455 U.S. at 747-48. The Court explained:

> When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. "If the State prevails, it will have worked a unique kind of deprivation. . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status, is therefore, a commanding one." . . . Few forms of state action are both so severe and so irreversible.

455 U.S. at 758 (quoting *Lassiter v. Dep't of Social Serv.*, 452 U.S. at 27).

In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the Court, held that an indigent parent had a right to a free transcript in order to appeal the termination of her parental rights. Because of the fundamental right at issue in termination proceedings, to penalize poor parents by making appeal prohibitively expensive violates the Equal Protection Clause.

When *M.L.B.* was decided, the Court had already determined that the State must provide indigent defendants with financial assistance to file an appeal as of right from criminal convictions, including non-felony offenses not punishable by jail time. *Mayer v. Chicago*, 404 U.S. 189 (1971); *Griffin v. Illinois*, 351 U.S. 12 (1956). But the Court had also decided that such assistance was not constitutionally required in ordinary civil cases. *United States v. Kras*, 409 U.S. 434 (1973). A key aspect of the *M.L.B.* decision, therefore, was determining whether the liberty interests at stake in a termination proceeding were more of the magnitude of a criminal conviction or an ordinary civil case. The Court found a termination of parental rights to be more analogous to a criminal proceeding:

> M.L.B.'s complaint is of a different order. She is attempting to defend against the State's destruction of her family bonds, and to resist the

> brand associated with a parental unfitness adjudication. Like a defendant resisting criminal conviction, she seeks to be spared from the State's devastatingly adverse action.

519 U.S. at 125. Therefore, "we place decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice.'" *M.L.B.*, 519 U.S. at 124. (quoting *Griffin*, 351 U.S. at 24).

B. <u>The Termination of Mr. Gordon's Parental Rights Is Not Narrowly Tailored to Serve a Compelling State Interest.</u>

"When a statute 'significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.'" *F.E. v. G.F.M.*, 35 Va.App. at 662, 547 S.E.2d at 538 (quoting *Zabloski v. Redhail*, 434 U.S. 374, 388 (1978)). In *F.E.*, this Court applied strict scrutiny to a six-month limitation period for challenging adoptions, as applied to a father who had allegedly been fraudulently induced to sign a consent to adoption. Strict scrutiny is also appropriate here, another case in which father has had his parental rights terminated by means of an adoption by maternal grandparents.

The record in this case reveals no compelling state interest in terminating Mr. Gordon's parental rights. In *F.E. v. G.F.M*, this Court has recognized that "the state has a compelling interest in preserving stability in a family relationship, particularly when a young minor is involved." 35 Va.App. at 664, 547 S.E.2d at 539 (internal quotation marks and citation omitted). However, as in *F.E.*, the termination of Mr. Gordon's parental rights is far too broad, and indeed is counterproductive of the state's interests.

There is no reason to believe that the State's interests will be effectuated by terminating Mr. Gordon's parental rights. "[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Stanley*, 405 U.S. 652. Here, as explained in more detail above, there was no finding - not even an allegation - that Mr. Gordon is unfit. Unless shown otherwise, the court must follow the "presumption that fit parents act in the best interests of their children." *Troxel*, 530 U.S. 57. "[U]ntil the State proves parental unfitness the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Santosky*, 455 U.S. at 760.

The Circuit Court expressed concerned about disrupting Nash's current living situation. But that concern can be fully addressed without the exceedingly drastic step of terminating Mr. Gordon's parental rights. As explained earlier, Mr. Gordon has filed a custody petition in the Juvenile

and Domestic Relations Court which is presently stayed pending the outcome of the adoption case. That court will be in a position to evaluate the facts and the expert testimony and devise a plan that will be minimally disruptive of Nash's life. Possibly, a very gradual transfer of custody could take place. Possibly, the J&DR Court will prefer to grant regular visitation to Mr. Gordon before committing to a change in custody. The point is, there are any number of ways for Mr. Gordon to remain a part of his son's life without risking the kind of trauma envisioned by Circuit Court.

Indeed the Circuit Court itself acknowledged that "it's in the best interests of Nash that he have as healthy a relationship or understanding of his father as he can." (App. 46). But the court's order entirely eviscerates any possibility of such a continuing relationship. The court did not merely deny custody to Mr. Gordon, he terminated his right to have any kind of relationship with Nash at all. The adoption makes it impossible for Mr. Gordon ever even to *ask* a court for visitation with his son. As this Court pointed out in *F.E. v. G.F.M.*:

> Code § 10-124.1 provides that only a person "with a legitimate interest" has standing to request custody or visitation and that "[a] party with a legitimate interest . . . shall not include any person . . . whose parental rights have been terminated by court order, either

> voluntarily or involuntarily." *See also* Code § 63.1-233 (providing that final order of adoption divests birth parents of right to petition for visitation). Therefore, father will not have standing to request visitation unless or until the trial court rules in his favor on the merits by setting aside the adoption order.

5 Va.App. at 671, 547 S.E.2d at 542. The adoption order is therefore directly contrary to what even the Circuit Court claimed to believe was Nash's "best interests."[2]

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[2] The Supreme Court has observed that "Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias." *Santosky*, 455 U.S. at 763. The Circuit Court's evident bafflement at Mr. Gordon's financial limitations and naiveté about the social services system - both of which contributed to his inability to regain custody after his child was taken out of state without his knowledge - might suggest some such bias. The court evidently believed that Mr. Gordon *ought* to have done something sooner, but did not articulate what a man in Mr. Gordon's position could possibly have done.